

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2003 - 0001

In the Matter of
Statement of Water Diversion and Use S015151 of
DAGNY GRANT, and
Petition for Temporary Change
Involving the Transfer of Up To 1,015 Acre-Feet of Water
to Instream Use Within the North Fork Tule River
Under Pre-1914 Appropriative Water Right Claim

SOURCE: North Fork Tule River

COUNTY: Tulare

**ORDER RECONSIDERING AND AFFIRMING
WR ORDER 2002-0010-DWR DENYING TEMPORARY CHANGE**

1.0 INTRODUCTION

This order reconsiders and affirms the denial of a petition for temporary change of place of use and purpose of use of a claimed pre-1914 water right. The petitioner for change, Ms. Dagny Grant (petitioner), filed the petition for temporary change on June 25, 2001. The petitioner claims a pre-1914 water right to water from the North Fork Tule River in Tulare County, and seeks to temporarily transfer it to fishery use in a two-mile reach of the river adjacent to her property, under Water Code sections 1725, et seq., and 1707. On September 20, 2002, in WR Order 2002-0010-DWR, the Chief of the Division of Water Rights (Division Chief) denied the petition for temporary change involving a transfer of up to 1,015 acre-feet of water to instream use in the North Fork Tule River. In response to the denial, the petitioner filed a petition for reconsideration, alleging errors in law and in the evaluation of the evidence. On December 2, 2002, in WR Order 2002-0015, the State Water Resources Control Board (SWRCB) granted reconsideration. The order granting reconsideration made no judgment on the merits of the petition. It set a schedule for issuing a final order addressing the merits.

2.0 BACKGROUND

The petitioner claims a right to 100 miners inches of water (2.0 cubic feet per second [cfs], based on the southern California standard for miners' inches). Based on her Statement of Water Diversion and Use No. S015151, filed concurrently with her petition for change on June 25, 2001, the petitioner claims that owners of the Battle Mountain Ranch (Ranch), which she now owns, have diverted this water from the North Fork Tule River under a claimed pre-1914 right since 1880 to irrigate 90 acres of pasture and for stock watering. The petitioner seeks to transfer 1.5 cfs of the water, which is approximately 1,015 acre-feet (af), to instream use. The proposed temporary place of use of the transferred water would be a two-mile reach of the river adjacent to the Ranch.

The waters of the Tule River and all of its tributaries have been declared fully appropriated under SWRCB Order WR 98-08 (Declaration of Fully Appropriated Stream Systems). The Ranch's water use from the North Fork Tule River is identified in Department of Water Resources Bulletin 94-1 (1964).

The Division Chief denied the petition for change on two grounds, both of which were based on the absence of evidence to support a finding that is prerequisite to approving a temporary change under section 1725. First, the Division Chief was unable to make the finding required under Water Code section 1725, for a temporary change due to a transfer, that the transfer involves only the amount of water that would have been consumptively used or stored by the water right holder in the absence of the temporary change. The basis for this determination is that the petitioner has no current physical means of diverting the water for consumption in the absence of the temporary change.¹ Second, the Division Chief was unable to make another finding, required under section 1727(b)(1), that the change would not injure any legal user of the water. The basis for the Division Chief's second determination is that evidence in the record shows that the

¹ If the petitioner had filed the petition for change under either section 1702, et seq., or section 1735, et seq., there would be no statutory requirement that the water could be otherwise used. But, since the petitioner filed this petition under section 1725, et seq., as a temporary change (one year), the Division Chief must find that the water would have been used or stored by the water right holder in the absence of the change. On the facts presented, the Division Chief was unable to make this finding. Section 1725 contains this limitation apparently because section 1725, et seq., provides for expedited processing, including an exemption from the California Environmental Quality Act, and does not require a hearing unless the petitioner agrees to a hearing.

claimed pre-1914 water right sought to be transferred may have been forfeited for nonuse, making any approval of a change potentially harmful to other water right holders from the North Fork Tule River.

3.0 USE OF THE WATER IN THE ABSENCE OF THE TEMPORARY CHANGE

The Division Chief was unable to make the required finding under Water Code section 1725 that the transfer will only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change.

Section 1725 defines “consumptively used” as meaning “the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.”

Based on the current lack of a diversion structure to divert the water that is the subject of the petition for temporary change, the Division Chief found that he was unable to make the above finding. A temporary transfer is a transfer for a period of one year or less. (Wat. Code, § 1728.) Petitioner has no physical means to divert the water. Further, construction of a diversion structure from start to finish, including design work, regulatory applications and approvals, and physical construction, could consume the entire term of a one-year temporary transfer.

Even if the petitioner were successful in establishing a diversion facility, the petitioner would not necessarily meet the requirement under section 1725 that the “transfer would only involve the amount of water that would have been consumptively used or stored by the [permittee or licensee] in the absence of the proposed temporary change.” Diversion is just the first step in either consumptively using or storing water. If the petitioner would consumptively use the water, the petitioner would need to show that she could beneficially use the water in the absence of the proposed temporary change. For this showing, it is necessary to show that all the water could be used for whatever alternative beneficial use the petitioner has available. Wasting water would violate the provisions of California Constitution, article X, section 2. If, alternatively, the petitioner would store the water, then she would need a storage facility. There is no indication in the materials available in the file that the petitioner has a storage facility. Accordingly, if the petitioner decides to file a new petition for change under section 1725 in the future, she should

submit materials to demonstrate that she would both divert the water and put it to beneficial use in the absence of the proposed change.

The petitioner and Environmental Defense argued that it is not good policy to require the existence of a diversion structure as a prerequisite to converting an appropriative consumptive water right to instream use.² The SWRCB agrees with this contention in cases where the proposed change is permanent or long-term and the procedural safeguards associated with a longer-term change are available, as would be the case under Water Code sections 1702, et seq., or 1735, et seq. In the case of a temporary change involving a transfer under section 1725, et seq., however, we disagree with this contention, both because of the statutory language and because ignoring this procedural safeguard would be bad policy under the circumstances. Because section 1725, et seq., is an expedited review process for temporary changes due to transfers, it includes limitations to prevent the expedited change from causing injury to other legal users of the water or unreasonable effects to fish and wildlife. By limiting temporary changes due to transfers to water that otherwise would be consumptively used or stored, section 1725 ensures that the petitioner can not, due to the expedited processing involved, cause injury. A particular concern is that a temporary change does not transfer “paper water.” The transfer of “paper water” tends to be at the expense and injury of other water right holders. In the present circumstances involving a temporary change due to a transfer, there was no hearing required, and the change, if approved, would be exempt from the requirements of the California Environmental Quality Act (Wat. Code, § 1729). These abbreviated procedures could provide inadequate protections for other water right holders and the environment without the additional safeguards, including the instant requirement that the water would be consumed if it were not transferred. The SWRCB cannot make the finding required by section 1725 based on the evidence in the current record, and on this basis cannot approve the petition.

² Water Code section 1725 does not specifically require that there be a diversion structure, but the petitioner must establish that the water would have been consumptively used or stored in the absence of the petitioned change. (*See also* Wat. Code, § 1726(e); SWRCB Order 99-12 at pp. 14-15.) The petitioner has not met the burden of showing that the water would have been consumptively used or stored in the absence of the petitioned change.

4.0 UNDER WHAT PROCESS COULD THE PETITIONER TRANSFER A WATER RIGHT TO INSTREAM USE?

As discussed above, the SWRCB cannot approve the petition for temporary change filed under Water Code section 1725, et seq., because the evidence is not adequate to show that the petitioner would have consumptively used or stored the water in the absence of the proposed temporary change. The section 1725 requirement that the water would be consumptively used or stored in the absence of the proposed temporary change does not appear in either Water Code section 1702 or in Water Code section 1735, et seq., both of which are for longer-term changes and both of which are subject to greater procedural protections for other legal users of the water and for the environment than the temporary changes allowed under section 1725, et seq.

In addition to meeting the requirements under section 1702 or under section 1735, et seq., in any future petition for a change to instream use, the petitioner would have to meet the requirements under section 1707. Several parties objected to the proposed temporary transfer on the basis that the pre-1914 water right that the petitioner seeks to transfer has been forfeited due to nonuse, and consequently that they would be injured by the change. The Division Chief found that the claimed pre-1914 water right may have been forfeited, and that consequently a potential existed for injury to other legal users of the water, which would violate section 1727, subdivision (b)(1). Both section 1702 and section 1735, et seq., contain similar provisions precluding approvals that would cause injury to other legal users of the water. The regulations adopted by the SWRCB provide that, for all change petitions, the petitioner must establish that the proposed change “will neither in effect initiate a new right nor injure any other legal user of water.” (Cal. Code Regs., tit. 23, § 791, subd. (a).) Accordingly, the petitioner would have to establish under any change petition that the proposed change would not result in injury to another legal user of the water and would have to prove that she has the water right she seeks to transfer.

Water Code section 1707, subdivision (b)(1), provides that the SWRCB can approve a transfer only if it “will not increase the amount of water the person is entitled to use.” If the right does not exist due to forfeiture or any other reason, then the proposed transfer cannot be approved because it would increase the amount of water the person could use. To obtain the finding required under Water Code section 1707, subdivision (b)(1), the petitioner would have to provide

information to the SWRCB adequate to demonstrate that she currently has a water right to divert and use the waters of the North Fork Tule River. Such a right must cover the amount of water she seeks to transfer to instream use. If there is evidence that the claimed pre-1914 water right has been forfeited, the petitioner will have to provide evidence that the water right has not been forfeited. Such evidence should be of a reliable and substantial nature, such as written documentation or non-hearsay testimony by a disinterested witness. Water Code section 1240 applies to the loss or retention of a pre-1914 water right. The case law pertaining to forfeiture of a pre-1914 water right is set forth in *Smith v. Hawkins* (1895) 110 Cal. 122 [42 P. 453] and in *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578 [99 Cal.Rptr. 446].³

Water Code sections 1707, 1735, et seq., and 1702 contain additional requirements that the petitioner would have to meet. Also, other laws such as the California Environmental Quality Act (Pub. Res. Code, § 21000 et seq.) and other sections of the Water Code may be applicable to a future petition for change.⁴

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³ The first published draft of this order addressed the question of whether or not the SWRCB could make the finding required under Water Code section 1707, subdivision (b)(1), that the proposed change would not increase the amount of water that the petitioner is entitled to use, and concluded that the SWRCB could not make this finding. The discussion included the law of forfeiture as it pertains to pre-1914 water rights and a review of the applicable information provided by the parties. Although the SWRCB staff assured the petitioner that the SWRCB was not in a position to effectuate a forfeiture of the pre-1914 water right by denying the petition for temporary change on this ground, and that evidence in a future proceeding could, if adequate, prove that no forfeiture had occurred, the petitioner expressed great concern regarding the suggested findings. In light of the denial of the petition for temporary change based on the inability of the SWRCB to make a necessary finding under section 1725, it is not necessary to also deny the petition under this alternative ground. Accordingly, the analysis of the alternative ground for denial is not included in this order. Nevertheless, the petitioner must, in any future petition for change to instream use under section 1707, meet the burden of proving that the change can be approved under this section.

⁴ The petitioner expressed concern that during the pendency of a future petition for change, the SWRCB might determine that the petitioner had lost her pre-1914 water right due to non-use during the pendency of the petition, and either deny the petition on that basis or take other action to eliminate the claim of a pre-1914 right. The SWRCB assures the petitioner that if she is diligently pursuing a petition for change in an effort to put the water to beneficial use, that the SWRCB will not apply the period during which the petition is pending to any period of nonuse that would result in loss of an otherwise valid pre-1914 right that she is attempting to transfer.

ORDER

IT IS HEREBY ORDERED that, upon reconsideration, WR Order 2002-0010-DWR denying the temporary change is affirmed.

CERTIFICATION

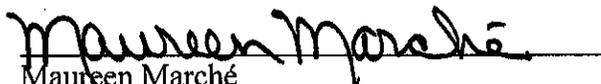
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 2003.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Clerk to the Board